ISSN 1712-4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

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March 2013

NOTICE TO THE COMMUNITY

WIRELESS ACCESS AT THE OLRB

The Board is pleased to announce the introduction of Wireless Internet Access to its public floors and hearing rooms (Floors 2, 3 and 4).

Effective Monday, February 25, 2013, counsel, clients and other members of the labour relations community attending at the Board have had available to them password-protected wireless access to the internet. The service is available weekdays between 8am and 6pm.

Parties wishing to use the wireless internet service may obtain the password from the Board's Client Services Representatives at Reception (2nd Floor). The password will be changed bi-weekly.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in February of this year. These decisions will appear in the February/March issue of the OLRB Reports. The full text of recent OLRB decisions is now available on–line through the Canadian Legal Information Institute at www.canlii.org.

Health and Safety – Reprisal – The worker refused to drive a replacement truck he was provided because he alleged it was unsafe to transport steel – He testified the steering was loose, the conditions of the mirrors made it difficult to change lanes; there was no engine brake (or Jake brake) and there were exposed wires from the dashboard – The worker advised the company he would not drive the truck as it was unsafe (although he did offer to return the truck to Hamilton, without the trailer attached) and he was terminated on that day – In the face of uncontradicted evidence by the worker the Board found that the worker reasonably believed the truck to be unsafe for the purpose of hauling steel, that he refused to work as a result and that he promptly notified his employer of this refusal – The employer, rather than investigating this refusal, terminated the worker's employment which termination was motivated, at least in part, by his compliance with the Act – Although reinstatement with full compensation was the presumptive remedy in these situations, this would not be appropriate given the unworkable relationship between the parties – Accordingly the Board ordered compensation from the date of termination to the date of hearing, plus an additional four weeks pay – Application granted

LP SERVICES; RE WADE BARBER; OLRB File No. 2855-12-OH; Dated February 26, 2013; Panel: Jesse M. Nyman (12 pages)

Duty of Fair Representation – Ratification and Strike Vote – These applications alleged violations of the Act arising out of the round of teacher bargaining in Ontario, described in an earlier Board decision (*R v. OSSTF* 2012 CanLII 80016), resulting in the MOUs that were negotiated between the Government and OECTA – The applicants allege that OECTA has violated its constitutional provisions and by-laws by, among other matters, failing: to communicate with its members; to obtain proper authorization for bargaining; to abide by systemic bargaining objectives; to abide by the authorizing resolution of the Council of Presidents – OECTA brought a

motion that there was no labour relations purpose to proceed given that the *Putting Students First Act* did not permit the relief sought and that all these matters were essentially internal union affairs where the appropriate recourse was political, not legal before the Board – The Board reiterated its longstanding jurisprudence which makes it clear that s. 74 explicitly deals with "representation of the employees in the unit" – The Board found that the upcoming elections in OECTA, where virtually all of the leadership responsible for the MOU will be challenged, was the appropriate place for the wisdom of these choices made by the OECTA leadership to be measured—not under the guise of an application of fair representation – The Board noted that the nature of political arrangements OECTA reaches with the Government of Ontario as a mature stakeholder in the education sector are not matters that this Board is either qualified to or should intervene in, question or regulate – The forum for addressing the extent to which OECTA's constitution or by-laws have been violated is the courts, not the Board, and finally an allegation under s. 44 requires ratification of a collective agreement and the MOU was not an agreement with one of the Catholic school boards, but rather an agreement with the government – Matters dismissed

RICHARD BROCK, PRESIDENT, ON BEHALF OF THE MEMBERS OF THE HALTON ELEMENTARY UNIT OF THE ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION (O.E.C.T.A), RE THE ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION (O.E.C.T.A.); HALTON CATHOLIC DISTRICT SCHOOL BOARD; OLRB File No. 1946-12-U; 2014-12-U; 2305-12-U; 2409-12-U; Dated February 26, 2013; Panel: Bernard Fishbein (22 pages)

Bargaining unit – Certification – Employer – The Board first determined that Sysco was the employer of the employees supplied to it by an employment agency for the purposes of the Act – The Board found that Sysco possessed the effective and fundamental control over matters dealing with training, discipline, evaluation, day-to-day supervision, assignment of duties and amount of remuneration – Additionally there was a high level of integration of the workers into Sysco's workplace – Sysco, possessing the greatest control over all aspects of the employment relationship, was the true employer – The Board went on to determine that excluding these temporary employees from the bargaining unit would not create serious labour relations problems for the employer, whereas including them in the unit would exacerbate the union's ability to represent these employees and weaken its negotiating position, particularly given the fragmentation in the workplace between the temporary and full-time employees – Certificate issued

SYSCO FINE MEATS OF TORONTO, A DIVISION OF SYSCO CANADA, INC.; UFCW CANADA LOCAL 1000A; OLRB File No. 3484-11-R; 3662-11-U; 3815-11-U; Dated February 25, 2013; Panel: Maurice A. Green (10 pages)

Employment Standards – Change in Working Conditions – Termination – The applicant sought termination and overtime pay from her former employer under section 116 of the *Employment Standards Act* ("Act") – The applicant, a graduate student employed in a laboratory for 30 hours per week, refused to extend her employment after being presented with an employment contract containing an intellectual property clause – Regarding termination pay, the Board considered whether the employee was constructively dismissed – Based on an objective analysis, the Board found the applicant had no reason not to believe that the contract represented new terms and conditions of her employment; the applicant was informed that she had to sign the contract in order to continue employment; and the inclusion of the clause was a change in fundamental term and condition of employment – Thus, the applicant was constructively dismissed – This conclusion was not affected by the fact that the clause was included in error – The applicant testified that she regularly worked beyond 30 hours per week in order to complete her work – The applicant's entitlement to overtime pay arose under the Act and not the university's policy because the applicant never sought authorization for the extra hours worked as required by the policy – In determining whether the employee received the employment standard or a greater contractual benefit in relation to hours worked in excess of 30 hours per week, but not in excess of 44 hours per week, the Board examined whether the applicant was a salaried employee or an hourly paid employee in form and substance – Salary is used to describe a fixed periodic payment for services rendered, but other characteristics, such as variation in compensation for hours worked, should be considered – The applicant was a salaried employee because her salary did not vary with the fluctuating hours she worked in each

week – Nothing in the Act entitles a salaried employee to receive additional compensation for hours that exceed the normal hours, but are less than 44 hours per week, except where the employer does not pay the salaried employee at least the prescribed minimum wage under the Act – Although the applicant was entitled under the Act to overtime pay for hours worked in excess of 44 per week, the evidence was unclear whether the applicant worked more than 44 hours in any week – The applicant was entitled to termination pay and vacation pay, but not overtime pay – Application granted, in part

SAFAA SABBAH; RE UNIVERSITY OF OTTAWA; DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1616-11-ES; Dated February 5, 2013; Panel: Ian Anderson (20 pages)

COURT PROCEEDINGS

Health and Safety – Judicial Review – A guest at a ski resort died while swimming in an unattended pool – The Court of Appeal considered whether a ski resort was required to report a "guest injury" to the Ministry of Labour on the basis that it was a death or critical injury incurred by a person at a workplace as contemplated by subsection 51(1) of the *Occupational Health and Safety Act* ("Act") – The Board concluded that reporting was required because a swimming pool was a "workplace" – The Divisional Court dismissed the application for judicial review on the basis that the Board's determination was reasonable – The Court of Appeal held that the Board's decision was unreasonable – The interpretation given by the Board to subsection 51(1) that focused on location would make every place a "workplace" because a worker may be present or passing through at some time; consequently, any death or critical injury to anyone and anywhere would be a reportable occurrence, regardless of the cause – Although the Act is remedial and subsection 51(1) is intended to capture a range of injuries affecting workers, the Board's approach would expand the powers of the Ministry beyond what was intended by the legislature and is required to ensure worker safety – Interpreting the provision contextually and purposively, the words "from any cause" are to be interpreted as requiring some nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety – In addition to this nexus, reporting requirements will be triggered where the death or injury occurs at a place where a worker is carrying out his or her employment duties at the time the incident occurs or one where a worker might reasonably be expected to be carrying out such duties in the ordinary course of work; and where a worker or non-worker is critically injured – There was no evidence that the pool death was caused by any hazard that could affect worker safety – Appeal allowed

BLUE MOUNTAIN RESORTS LTD.; RE: MINISTRY OF LABOUR, ONTARIO LABOUR RELATIONS BOARD; RICHARD DEN BOK; (Court File No. C54427); Dated February 7, 2013; Panel: MacPherson, Armstrong and Blair JJA (26 pages)

Delay – Judicial Review – The Faculty Association brought a motion for the court to dismiss four judicial reviews for delay as Mr. Khaiter, a member of the faculty of York University, had failed to set down any of the matters to be heard – These matters all relate to Mr. Khaiter's allegations that YUFA has failed to represent him fairly, which he brought to the OLRB and the HRTO – The Court noted that no date had yet been set to hear any matter and that the delays ran from two years and three months to over five years since the respective tribunal had issued its decision – The court found the delay occasioned by the failure to set any of the applications down for hearing made it clear that the delay was unacceptable – The issue then turned on whether this delay prejudiced YUFA – The court noted that the events giving rise to the original complaints go back years; "that the issues relate to employment" and that "to try and undertake these proceedings now would be disruptive and the validity of the results uncertain" – The court found the presence of prejudice obvious – The court noted however that it was uneasy dismissing the applications based on the evidence of delay, particularly because YUFA could have filed the Hearing Request Form and forced a hearing date – The court considered other factors – First it noted that Mr. Khaiter has been misusing the processes that the Board and the HRTO offer for a purpose not related to resolving the disputes at hand and that the delay in processing the four applications for judicial review is demonstrative of the same attitude and consistent with an effort to keep these disputes alive rather than bringing them to a conclusion – Second, he did not have a satisfactory explanation for the delay – The court concluded that by carrying these matters as he has, Mr. Khaiter delayed too long and lost or, by his actions, gave

up the right to have the four applications for judicial review heard on the merits – Motion granted, applications dismissed

KHAITER; LABOUR RELATIONS BOARD (ONTARIO) 2013 ONSC 791 (Court File No. 431/08); Dated February 13, 2013; (20 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Defence Contract Management Agency Americas (Canada) (No. 2) Divisional Court No. 86/13	0955-11-R	Pending
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	June 6, 2013
Defence Contract Management Agency Americas (Canada) Divisional Court No. 513/12	0955-11-R	March 21, 2013
Bur-Met Construction Divisional Court No. DC-12-010 **Thunder Bay**	3893-11-R	Pending
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	April 17, 2013
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	May 22/13
2130869 Ontario Ltd. Divisional Court No. 359/12	3518-11-R and 3519-11-G	March 24/13
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al (Flynn) Divisional Court No. 325/12	2730-11-JD	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	May 22/13
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Thomas Fuller Construction et al Divisional Court No. 12-1832 **Ottawa**	1056-11-R	Week of April 8/13
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR **Hamilton**	2519-11-R	Pending
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	March 15/13
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **London**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed February 20, 2013

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473–08–U	December 7, 2012 Heard, reserved
Greater Essex Catholic District S.B. Supreme Court No. 34992	3122–04–G	Dismissed February 14, 2013
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	Dismissed February 20, 2013
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Supreme Court No. 34915	3322–03–R 2118–04–R	Dismissed February 21, 2013
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Pending
Blue Mountain Resorts v. MOL Court of Appeal No. C54427	1048–07–HS 0255–08–HS	February 7, 2013 Quashed
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999–07–ES	Dismissed February 15, 2013
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	Dismissed February 20, 2013